IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 431.

THE UNITED STATES, *Petitioner*,

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, and PAUL H. BEUTTAS, Trading as B-W CONSTRUCTION CO., NOT INC., *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
740 15th Street, N. W.,
Attorneys for Respondents.

November 8, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Statement	1
Questions Presented	6
Question No. 1	6
Analysis of authorities under question No. 1	8
Question No. 2	13
Analysis of authorities under question No. 2	15
Question No. 3	19
Analysis of authorities under question No. 3	20
Conclusion	21

CASES CITED.

Bailey v. Central Vermont Ry., 309 U. S. 350	8
Bayne v. Morris, 1 Wall. 97	16
Burchell v. Marsh, 17 How. 344	17
Comb Co. v. United States, 100 Ct. Cls. 240	18
Doyle v. Continental Ins. Co., 94 U. S. 535	14
Dravo Corp. v. United States, 93 Ct. Cls. 734	21
Goltra v. Weeks, 271 U. S. 536	11
Gray v. Powell, 314 U. S. 402	17
Guaranty Trust Co. v. Green Cove R.R., 139 U. S. 137	14
Insurance Co. v. Morse, 20 Wall. 445	14
Kihlberg v. United States, 97 U. S. 398	9
Le Veque, et al. v. United States, 96 Ct. Cls. 250	20
Martin v. B. & O. R.R., 151 U. S. 673	14
Martinsburg & Potomac R.R. Co. v. March, 114 U. S. 549	9
Merrill-Ruckgaber Co. v. United States, 241 U. S. 387	10
Milwaukee & St. P. Ry. v. Kellogg, 94 U. S. 469	8
Plumley v. United States, 226 U. S. 545	10
Ripley v. United States, 223 U. S. 695	12
Sweeny v. United States, 109 U. S. 618	12
Tennant v. Peoria & P. U. Ry., 321 U. S. 29	8
Terral v. Burke Construction Co., 257 U. S. 529	14
United States v. Blair, 321 U. S. 730	15
United States v. Gleason, 175 U. S. 588	15
United States v. Mason & Hagner Co., 260 U. S. 323	16
United States v. McShain, 308 U. S. 512	11

STATUTE.

Judicial Code, Section 145, (28 U. S. C. 250)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 431.

THE UNITED STATES, *Petitioner*,

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, and PAUL H. BEUTTAS, Trading as B-W CONSTRUCTION CO., NOT INC, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

STATEMENT.

The petitioner seeks a review of that part of a decision of the Court of Claims of the United States which awarded the respondents a judgment of $4,660.83 for increased wages.

The statement, as outlined by the petitioner, by reason of the fact that it emphasizes only certain phases of the case supporting its theory and leaves out among other

things the part thereof which had particularly to do with the ruling on the question involved herein, we venture to restate:

The respondents entered into a contract with the petitioner November 26, 1935 for the construction of the foundations of the Jane Addams Houses in Chicago, Illinois, for the consideration of $104,890.00, the contract providing that the work was to be completed within seventy-five calendar days after receipt of notice. (Fdg. 2)

On November 21, 1935 the District Manager of the Housing Division of Public Works Administration at Chicago wrote the respondents in part as follows:

> "With this information at hand please arrange to proceed with the work under your contract for foundations for Jane Addams Houses, Project H-1405, as outlined in the plans and specifications.",

and the respondents, in accordance therewith, did proceed with the work in accordance with this direction of November 21. (Fdg. 8)

On December 10, 1935 the contracting officer, due to changes that were being made by him, ordered the respondents to suspend all work until further notice, and the work was suspended and held up by the contracting officer until February 17, 1936 but, due to weather conditions at that time, respondents were unable to proceed until February 26, 1936. (Fdg. 9)

The specifications provided the hourly wage rates which were to be paid, and stated,

> "The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19(a) of the contract."

and Article 19 of the contract provided:

> "The wage rates established in the specifications shall be subject to change by the Federal Emergency Administrator of public works. In the even that the Federal

Emergency Administrator of Public Works establishes different wage rates the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract." (Fdg. 5)

On December 28, 1935 respondents received a report from their superintendent on the project based on information obtained by him that the Federal Emergency Administrator of Public Works was about to change the scale of wages for carpenters and laborers on PWA projects. At that time the government had not issued invitations for bids and specifications for the project covering the superstructures of the Jane Addams Houses, the foundations of which were covered by the respondents' contract. The government specifications and invitations for bids for such superstructures were issued February 15, 1936, which set forth a scale of wages applicable to the superstructures in excess of those set forth for the foundations covered by the respondents' contract. (Fdg. 12)

At the commencement of their work respondents began paying the rate of wages set forth in their contract and continued to pay such wages until sometime in February or March, 1936. Respondents' force was unionized and, because they were not paying the wage scale provided in the invitation and specifications for the superstructures, the union called a strike and thereby enforced payment by respondents of the wage scale provided in the project for the superstructures and demanded payment on the increased scale retroactive to January 8, 1936, which was paid by the respondents. (Fdg. 12)

The scale of wages announced in the invitation for bids and specifications for the superstructures was higher than the scale prevailing in the territory at that time on private jobs, and the difference paid by the respondents between the two scales amounted to $4,321.00. (Fdg. 13).

A dispute arose between the petitioner and respondents as to reimbursement for the additional wages paid over and

above those set forth in the invitation for bids and the contract, the respondents contending that the petitioner had established higher wages on the project and that they were entitled to be reimbursed such increase as an added cost. The final change order No. 1 covering the foundations was revised and reissued by the Assistant Administrator on June 25, 1936 after the respondents' work had been substantially completed and did not include the wage increase in dispute, but reserved to the respondents their right to prosecute their claim. (Fdg. 14)

The respondents appealed to the Assistant Administrator of Public Works, who rendered a decision on June 29, 1936 and with reference to the claim for increased wages decided that the respondents were entitled to $909.00 but that the payment thereof was dependent upon the opinion of the General Accounting Office and should be submitted to it. (Fdg. 16)

On February 12, 1937 the respondents appealed to the Federal Emergency Administrator of Public Works, the head of the Department, and petitioned him for a decision of their claim. (Fdg. 17)

On May 20, 1937 the Hon. Harold L. Ickes, Federal Emergency Administrator of Public Works, after considering the respondents' appeal, addressed a letter to the Comptroller General, in which he denied the respondents' claim for increased wages, except in the sum of $909.00. In his report to the General Accounting Office he stated in part as follows:

> "I *understand* that the minimum rates specified are in accordance with those set forth in an agreement entered into between the Building Trade Employers' Association and the Unions of the City of Chicago. I do not have at my disposal a copy of this agreement which I *understand* established the rate contractors were to pay as wages up to and including January 1, 1936. I *understand* that the contractor is a member of this Association and had in his possession a copy of the agreement with the Unions prior to the time of his

bidding. The Government had no way of knowing what minimum rates would be established after January 1, 1936, as the Unions and the Building Trade Employers' Association had not established the rates for the year 1936 at the time the foundation work was bid upon. . . . Furthermore, *I am of the opinion* that the Contractors in the City of Chicago were advised by the Unions that on January 1, 1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936." (Italics Supplied) (Fdg. 18)

The statement made in the above quoted letter that the labor rates of wages provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated January 1, 1936, and that thereafter higher rates were to be established, was an error. The agreement between the Building Trade Employers' Association and the Unions fixing rates of wages did not expire until May 31, 1936. (Fdg. 19)

Three of the four judges hearing the case decided that all of the proof showed that the laborers would not have struck except for the government's action in establishing a higher minimum wage on the *very same building* on which the respondents' laborers were employed, and that the petitioner must have known that this would be the necessary consequence of its act, and further held that under Article 15 the parties did not agree in advance of any dispute to waive their right to sue for breach of the contract and to leave the final determination of any controversy to the decision to one of the contracting parties.

QUESTIONS PRESENTED.

1.

Whether Article 15 of a Standard Form Government Contract which provides that the decision of the head of the department on "all disputes concerning questions arising" under the contract shall be final and conclusive upon the parties, applies to a finding by the head of the department that the contractor's payment of higher wages than those specified in the contract were not caused by acts of the government.

The petition states "The Administrator found that not the acts of the government, but the signing of a new agreement with the union was the cause of the wage increase" (P. 9), and argues that because the Administrator made such a finding, notwithstanding the fact that the evidence in the case shows that by his own statement he admits he did not have a copy of such an agreement and that all of his statements were based upon his *understanding*, which the evidence shows was in error, that the Court of Claims cannot decide the case on the true facts but is bound to follow the admitted erroneous finding of the Administrator.

It is clear in the present case that the finding of the Administrator was erroneous and not based upon the true facts. The Court of Claims found, as a matter of fact (Finding 19), that the statement of the Administrator in his letter of May 20, 1937, and upon which he based his decision, was an error, and therefore the Court of Claims had the right to decide the case upon the undisputed true facts as shown in the Court's findings.

A case very similar to the present case is that of *United States* v. *Wharton, Green & Co., Inc.*, 303 U. S. 661, Writ of Certiorari denied April 4, 1938. That was a case which originated in the Court of Claims and involved a construction contract. The contract contained the usual Article 9 concerning delays and provided that the contracting officer

should ascertain the facts and extent and cause of delays and that his findings of fact shall be "final and conclusive." The contracting officer found the contractor chargeable for 194.5 days' delay. The Court of Claims found that the decision of the contracting officer was erroneous and gave judgment in favor of the contractor.

The government filed its petition for writ of certiorari to this Court and therein stated that the question involved was "Whether the Court of Claims, without proof of fraud or such gross error or negligence as will imply bad faith, may review and redetermine finding of fact where a contract provides that a decision of the contracting officer as to the facts shall be final and conclusive on the parties, subject only to appeal to the head of the department concerned within thirty days." One of the specifications of error was "In going behind the findings of a contracting officer without proof of fraud or such gross negligence as to imply bad faith." This Court denied the petition for writ of certiorari.

A fair and natural interpretation of Article 15 is that it really relates to questions of fact and does not repose in the head of the department the absolute right to make decisions on questions of law, such as, whether or not there has been a breach of a contract, as to hold otherwise would leave solely to the party who may have breached the contract the right to decide whether or not it had breached it.

The Court of Claims, in deciding against the petitioner's contention, recognized that it was not uncommon in construction contracts for parties to agree that the decision of the architect or engineer shall be final on certain questions and referred to the very cases now cited by the petitioner, but pointed out that provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and, preventing resort to the Courts, have never been upheld.

Analysis of Authorities Relied Upon by Petitioner.

Petitioner cites various decisions by this Court and claims that the present decision of the Court of Claims is in conflict therewith, and thus bases its reason for claiming that the writ of certiorari should be granted.

An examination of the decisions cited will disclose that the present decision of the Court of Claims is not in conflict therewith and, therefore, there is no grounds for granting the present petition for writ of certiorari.

Bailey v. Central Vermont Ry., 309 U. S. 350, 354.

This case is clearly not in point, as what was decided by this Court was that in a suit under the Federal Employers' Liability Act there was sufficient evidence to go to the jury as to whether or not the defendant was negligent in failing to use reasonable care in furnishing the plaintiff with a safe place to work.

Tennant v. Peoria & P. U. Ry., 321 U. S. 29, 34-35.

This case, like the previous one, was a suit under the Federal Employers' Liability Act, and the question involved was whether the negligence of the defendant was the proximate cause of the death, and what this Court decided was that it was not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences.

Milwaukee & St. P. Ry. v. Kellogg, 94 U. S. 469.

This was a suit for compensation for destruction by fire of the plaintiff's sawmill. The question involved was whether or not the fire which originated upon the defendant's steamboat was proximate cause of the destruction of the plaintiff's sawmill. The defendant requested an instruction that the injury sustained by the plaintiff was too remote from the negligence of the defendant to afford a ground for recovery, which instruction was denied, and the

question was left to the jury. This Court, in deciding in favor of the plaintiff, held that the true rule is that what is the proximate cause of an injury is ordinarily a question for the jury.

Kihlberg v. *United States*, 97 U. S. 398.

This suit involved a contract between the parties for the transportation of government stores and supplies, the contract providing that payment was to be made in all cases according to the distance from the place of departure to that of delivery, and that the Chief Quartermaster was to fix the distances which should govern in the settlement of the contractor's accounts for transportation. This Court decided that under the circumstances in that case there was no inference that the Chief Quartermaster did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, and stated in part as follows:

> "The difference between his estimate of distances and the distances by air line or by the road usually traveled is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties as collected from their agreement."

Martinsburg & Potomac R. R. Co. v. *March*, 114 U. S. 549, 553-554.

This was a suit to recover a balance claimed to be due plaintiff on a contract for grading and masonry on a section of a railroad contract, which provided among other things that whenever the contract shall be completely performed on the part of the contractor and the defendant's engineer shall certify the same in writing, together with his estimates, the company shall within thirty days after receipt of such certificate pay to the contractor the amount due. The declaration contained a copy of the contract but did not contain an allegation that the engineer had ever

certified in writing the complete performance of the contract, together with an estimate of the work and the amount of compensation due the contractor according to the prices established by the parties. The defendant demurred to the declaration, which was overruled. This Court held that the demurrer should have been sustained for the reason that the parties had agreed that the certificate of the company's engineer was necessary and there was no allegation that the engineer had been guilty of fraud or such gross mistake as to imply bad faith, or had failed to exercise honest judgment in discharging his duties. The declaration did not state facts entitling the plaintiff to sue the company in the absence of such a certificate.

Plumley v. *United States*, 226 U. S. 545-547.

This was a suit by a contractor for extra work and damages for delay. The contract provided that if there was any discrepancy between the plans and specifications or between the contract of McLaughlin (previous contractor) and the contractor, Plumley, the matter should be referred to the Secretary, the plaintiff agreeing to abide by his decision in the premises. The Secretary decided against him and this Court held that under the circumstances his construction was binding on the contractor.

Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387.

This was a suit by a contractor for extra work, the contract providing that the decision of the Supervising Architect as to the proper interpretations of the drawings and specifications should be final. There was a disagreement between the parties and the contractor applied to the Secretary of the Treasury, who confirmed the action of the Architect. This Court, in deciding in favor of the government, held that there was no intimation of unfairness on the part of the Supervising Architect and that there was no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect.

and that the contract explicitly provided that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications would be final.

Goltra v. *Weeks*, 271 U. S. 536.

This was a suit by the plaintiff to enjoin seizure of a fleet of tow-boats and barges which had been held by him as lessee. He charged a conspiracy to unlawfully deprive him of the boats. The Secretary of War had notified the lessee that in his judgment the lessee had not complied with the terms and conditions of the contract in that he failed to operate the boats as a common carrier and in other particulars and declared the contract terminated. The contract provided that the government reserved the right to make certain inspections and that non-compliance in his judgment with any of the terms and conditions of the lease would justify the termination of the lease. The evidence showed that from the time the plaintiffs got the boats they were not in use but were tied up except for the transportation of two small cargoes, and the bill of complaint admitted that the plaintiff had not fulfilled his covenant to operate as a common carrier. The plaintiff was given notice on March 4 of the termination and answered on March 8, but he tendered no facts upon which either the Secretary or Chief of Engineers could have any different conclusion from that already reached from the failure of the plaintiff to fulfill his obligation. Under the circumstances this Court dissolved the injunction.

United States v. *McShain*, 308 U. S. 512.

In this case a dispute arose between the contractor and the contracting officer with respect to the proper interpretation of the plans and specifications. The Court of Claims decided in favor of the contractor, and the question presented by the petition for writ of certiorari was as follows:

> "Whether the Court of Claims properly disregarded the decision of certain governmental officers upon the *interpretation of the plans and specifications*, when the

> Court made no finding of gross error sufficient to imply bad faith." (Italics supplied)

This Court granted certiorari and in a Per curiam decision reversed the Court of Claims.

Ripley v. *United States*, 223 U. S. 695.

This was a suit by a contractor for damages sustained by carrying out a contract to build a jetty. The contract provided that certain blocks should be laid on the jetty as the work progressed and when in the judgment of the United States Agent in Charge the case or mound had sufficiently consolidated. The Agent refused to permit the contractor to lay the blocks at certain times, causing the contractor additional costs. This Court, in the course of its opinion, stated among other things as follows:

> "No matter how long the delay or how great the damage, he was entitled to no relief unless it appeared that the refusal was the result of 'fraud or of such gross mistake as would imply bad faith' (citing cases).
>
> But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both of the contracting parties. The finding by the Court that the inspector's refusal was a gross mistake and an act of bad faith necessarily, therefore leads to the conclusion that the contractor was entitled to recover the damages caused thereby."

Sweeney v. *United States*, 109 U. S. 618.

This was a suit to recover the costs of a wall built around the National Cemetery at Fort Harrison, Virginia. The contract contained a provision that a representative of the government would be designated to inspect the wall, and after such representative should certify that the wall was in all respects as contracted for it should be received and become the property of the United States.

The representative of the government reported that the wall had been constructed without paying any attention whatever to the instructions given relative to material, nor to the orders given with regard to the gate-posts. That the condemned material was used and that he considered the workmanship unsatisfactory. As a result of the foregoing report the wall was taken down and a new one constructed in its place. No representative of the government ever certified that the wall constructed was in all respects as contracted for by the claimant or in any respect as contracted for. This Court held that the claimant could not recover for the reason that the government representative expressly refused to give the necessary certificate on the grounds that neither the material nor workmanship was such as the contract required, and that there was no showing of any fraud, nor such gross mistake as would imply bad faith, nor any failure to exercise honest judgment, and that the claimant had been notified of the defective character of the material and that it would not be accepted before he put it into the wall.

It will be seen from the foregoing that the decision of the Court of Claims in the present case is not in conflict with the decisions of this Court and that the first question presented does not justify the granting of a writ of certiorari.

2.

Whether if Article 15 of the contract was intended to apply, it could validly be agreed to by the parties.

In the event this Court decides that the first question advanced by the petitioner does not justify granting writ of certiorari, then there is no need of considering the second question presented.

Assuming for the time being that Article 15 of the contract does give the head of the department the absolute right to decide all disputes concerning questions arising under the contract, whether factual or legal, whether either

party has breached the contract, in other words, from the very day the contract was signed, foreclosing contractor's right to resort to the Courts created for that purpose, to decide questions of law and whether there has been a breach of the contract by the petitioner, it is clear that such an agreement could not be validly entered into by the parties.

The petitioner argues that a claimant is free to resort to the courts, the only effect of such a stipulation being to *narrow* the field of judicial inquiry. If the petitioner's contention is correct, that the decision of the head of the department on *all* disputes concerning questions arising under the contract is final and conclusive, and binding upon the parties, then the field of judicial inquiry is not narrowed, but entirely eliminated.

No extended argument is believed necessary on this question other than to point out, as the Court of Claims did in its decision, that in the Act of Congress of February 24, 1855 creating the Court of Claims, Judicial Code, Sec. 145 (28 U. S. C. 250) it was stated,

> "* * * the said Court shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States * * *."

If the petitioner's contention is correct then the right given by the Act of Congress to sue in the Court of Claims is taken away. A provision in a contract which gives to one of the parties the absolute right to determine all questions which may arise, and takes away from the other party any and all rights to question the correctness of the decision of the other party on all questions, is clearly void.

Insurance Co. v. *Morse*, 20 Wall. 445, 450, et seq.; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 537; *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, 142; *Martin* v. *B. & O. R. R.*, 151 U. S. 673, 684; *Terral* v. *Burke Construction Co.*, 257 U. S. 529. And in the present instance contrary to the law established by Congress in creating the Court of Claims to hear and determine claims founded upon contracts with the government.

The petitioner cites no cases by this Court or any other Court holding that such a contract would be valid and binding.

Most of the decisions referred to by the petitioner under this question are also referred to under the first question and as we have already analyzed them, no purpose would be served in repeating what we have said heretofore. The additional decisions referred to are the following:

Analysis of Authorities Relied Upon by Petitioner.

United States v. *Gleason*, 175 U. S. 588.

This case involved a contract which contained a provision that if the contractor should by freshets, ice or other force or violence of the elements and by no fault of his own be prevented from commencing or completing the work or delivering the material at the time agreed upon in the contract, such additional time "may" in writing be allowed the contractor for such commencement or completion as in the judgment of the contracting officer or his successor shall be just and reasonable. The Court below construed the foregoing word "shall" instead of "may". This Court disagreed with the lower Court and decided that so long as the engineer was not guilty of bad faith or of mistake or negligence so gross as to justify inference of bad faith, the judgment of the engineer was final.

United States v. *Blair*, 321 U. S. 730.

This case arose out of a government contract, and part of the claim was for costs of delay occasioned by another contractor on the same project. The contractor had 420 days to do the work but had planned to do it in 314 days and did finish it within the 420 days allowed by the contract. The contractor claimed that he was entitled to his increased costs because it had taken him the full 420 days instead of the 314 days within which he had planned to do the work. This Court held that there was nothing in the government

contract which imposed an obligation or duty on the government to aid the contractor in completing his contract prior to the stipulated completion date and that it was error for the Court of Claims to award damages to the contractor based upon the breach of a non-existent obligation.

The contractor had not availed himself of the appeal provisions of the contract found in Article 15, and this Court further held that said appeal provisions must be exhausted before relief is sought in the Courts as there was no finding or evidence that appeal to the head of an appropriate department would have been futile or prejudicial.

United States v. *Mason & Hagner*, 260 U. S. 323.

This case involved a "cost plus contract" and provided that the contractor should be reimbursed for all expenditures as should be approved by the contracting officer. The item in dispute was for premiums, the War Department having decided that it was a proper charge against the contract, while the Comptroller of the Treasury Department had disallowed the item. This Court held that as the War Department had approved the item, as it had a right to do under the contract, the Comptroller of the Treasury had no power over the decision of the War Department, which was exercised in accordance with the terms of the contract.

Bayne v. *Morris*, 1 Wall. 97.

The parties to this case, having certain differences, agreed to refer the matter to arbitrators who were authorized, in addition to determining the amount to be paid, to fix the terms as to time and security for any payment that should be awarded. An award was made on behalf of Morris, and they directed that the amount should be paid on certain dates and a bond should be given to secure the payments. No bond was given and suit was filed, before any of the amounts of the award became due. The Court below held that if suit were brought before any of the sums were due, plaintiff could not recover. This Court reversed

the lower Court and held that as the parties had submitted the matter to arbitrators, they were bound by the terms of the arbitration and when Bayne failed to deliver the bond for security Morris had a right to sue at once.

Burchell v. *Marsh*, 17 How. 344.

This case involved a bill in equity to set aside an award of arbitration as fraudulent and void. The answer denied the arbitrators acted unjustly but on the contrary acted justly, fairly and with due consideration for the rights of the parties. The matter was submitted on bill and answer. The lower Court set the award aside. This Court reversed the lower Court, stating that they were of the opinion that the record furnished no evidence of corruption or misbehavior in the arbitrators nor of ignorance as charged in the bill, or of any mistake which would justify the Court of Chancery in annulling it.

Gray v. *Powell*, 314 U. S. 402.

This was a suit by the Receiver of the Seaboard Air Line Ry. for an exemption of certain coal from Bituminous Coal Code on the ground that they were both producer and consumer of the coal. A hearing was had before the National Bituminous Coal Commission, which was later changed to the Bituminous Coal Division, and an order was entered denying exemption. Upon review there was a decree reversing the Director's order and this Court affirmed the decree below. The present decision was upon a petition for rehearing and this Court reviewed the conditions of the contract under which the coal was obtained by Seaboard as well as the various legislative enactments which sought to bring about a solution of the economic difficulties of the soft coal industry. The question involved was whether the Director's findings that Seaboard was not a producer of coal was to be sustained. This Court, after reviewing the Bituminous Coal Act and the provisions therein which provided for the determination by the commission and the review thereof by the Court, stated as follows:

"In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by §§ 4-II(1) and 4-A, the function of review placed upon the courts by § 6 (b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner."

Comb v. *United States*, 100 Court of Claims 240.

In this case, which involved a construction contract, the question involved was that of furnishing temporary heat. The contract provided that if there was no existing system to connect to, the contractor should supply sufficient heat by connecting up the boiler to be installed in the building or by other means approved by the Superintendent of Construction. The Superintendent of Construction refused to permit certain connections to be made. The contractor protested to the Commissioner of Indian Affairs, who sustained the Superintendent. Whereupon, the contractor applied to the head of the Department, who reversed the decision of the Superintendent and directed that a voucher be prepared to cover the costs incurred by the contractor. The Comptroller refused to pay on the ground that the decision of the contracting officer was final and conclusive. The Court of Claims held that the Comptrolier was wrong, as he gave no consideration to the contractor's right of appeal to the head of the Department.

We again submit that there is nothing in the foregoing decisions which is in any way contradictory to the decision of the Court of Claims or applicable to the present question, and granting a writ of certiorari is not justified.

3.

Whether the Government, in inviting bids for superstructures to be erected under separate and later contracts, specifying minimum wages which were higher than those fixed in respondents' contract for the foundations, thereby violated an implied obligation in respondents' contract.

Under this question the petitioner alleges that at the time the respondents entered into the contract the Building Trade Employers' Association of Chicago and the Unions of the City of Chicago had an agreement which fixed the same minimum rates as those provided in the contract and which was to expire on May 31, 1936, and then states that it was only shortly after that date that the respondents completed their work on the foundations and that of course the superstructures could not be erected until the foundations were completed, but that it was necessary that the contract for the superstructures be advertised and entered into in advance so that the work thereon could commence without delay after respondents had completed the foundation.

The foregoing statement by the petitioner might be of some importance were it not for the fact that while the contract was dated November 26, 1935, the respondents, by letter dated November 21, 1935, were requested to proceed with the work, and as the contract provided for its completion within 75 calendar days, in the normal course of events the contract would have been completed in the early part of February, 1936, prior to the time when the specifications were issued for the superstructures, in connection with which the higher rates of wages were established, but that due to changes made by the petitioner the respondents were ordered to stop work on December 10, 1935 and were not able to proceed until February 26, 1936, after the specifications for the superstructures had been issued. (February 15, 1936.)

Mr. Ickes' sole reason for stating that the government did not increase the wages the respondents were required to pay was based upon his *opinion* that the rates provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated on January 1, 1936, and that thereafter higher wages were to be established. Aside from the fact that Mr. Ickes was speculating in making such a statement, it was contrary to the facts. The only evidence in the case is that the agreement did not terminate until May 31, 1936, long after the contract was originally due for completion, and that the scale of wages announced for the superstructures was higher than the scale prevailing on private jobs.

The record is clear that whereas the government thought when the specifications for the foundations were issued that the fair wages were those set out in said specifications, by February 15, 1936, when but for the stoppage of work by the government the contract for the foundations would have been completed, conditions had changed to such an extent that the government no longer considered these fair wages and demanded that the contractor for the superstructures pay higher wages.

Except for preliminary work, respondents' work did not commence until after this change in the wage rate. The Court of Claims has found as a matter of fact that all the evidence showed that the laborers would not have struck except for the government's action in establishing a higher minimum wage on the very same building on which the respondents were employed, and further found as a matter of fact that the government did establish a higher wage rate on respondents' job and thereby was obligated to pay the increase.

Analysis of Authorities Relied Upon by Petitioner.

Petitioner cites two decisions of the Court of Claims in support of its contention, the first being *Le Veque, et al. v. United States*, 96 Court of Claims 250, in which case the

Court of Claims held that the establishment by the government of higher wages on another project in another part of the city did not require it to pay the increased wages upon the plaintiff's contract, and concluded that the increase in wages paid by the plaintiff in that case was not a necessary result of the government's act. The Court of Claims, in its decision in the present case, considered its decision in the Le Veque case, but pointed out that the facts in the present case were entirely different: that the increased wages in the present case were on the very same building on which the respondents were working; and concluded that in the present case the government did in fact establish higher wage rates on respondents' job.

The other case cited by the petitioner is *Dravo Corp.* v. *United States*, 93 Court of Claims 734. It is submitted that this case is not in point for the reason that the suit was brought under the Act of June 25, 1938, conferring jurisdiction upon the Court of Claims to hear and determine and enter judgment against the United States on behalf of contractors who had contracts with the United States and whose costs were increased as a result of the National Industrial Recovery Act. All the Court of Claims decided was that the plaintiff's increased costs were not the result of the National Industrial Recovery Act.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari to bring before this Court the decision and judgment of the Court of Claims of the United States does not invoke questions of sufficient public importance to justify its consideration by this Court, and that the decision of the Court of Claims is correct and sound and the petition should be denied.

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Attorneys for Respondents.

BRIEF FOR RESPONDENT

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 1 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 431.

THE UNITED STATES, *Petitioner*,

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, and PAUL H. BEUTTAS, Trading as B-W CONSTRUCTION CO., NOT INC., *Respondents*.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
740 15th Street, N. W.,
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS.

	Page
Short Statement of the Case	1
Statement of Facts	2
Summary of Argument	6
Argument	6
1. Article 15 not intended to apply to the question of whether the Government's Acts had caused the contractor to pay higher wages	6
Analysis of authorities relied upon by petitioner	11
2. That if Article 15 was so intended, then it could not be validly agreed to by the parties	13
Analysis of authorities relied upon by petitioner	16
3. That the Government did establish different wage rates and is liable to the respondents for the increase	23
Analysis of authorities relied upon by petitioner	30
Conclusion	31

CITATIONS.

Alabama Power Co. v. Ickes, 302 U. S. 464	34
Burchell v. Marsh, 17 How. 344	22
Comb v. United States, 100 Ct. Clms. 240	22
Doyle v. Continental Ins. Co., 94 U. S. 535, 537	14
Dravo Corp. v. United States, 93 Ct. Clms. 734	31
Goltra v. Weeks, 271 U. S. 536	18
Gray v. Powell, 314 U. S. 402	19, 21
Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, 142	14
Insurance Co. v. Morse, 20 Wall. 445, 450	14
Kihlberg v. United States, 97 U. S. 398	11
Le Veque et al. v. United States, 96 Ct. Clms. 250	30
Martin v. B. & O. R. R., 151 U. S. 673, 684	14
Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 553-554	16

Page

Merrill-Ruckgaber Co. v. United States, 241 U. S. 387 ... 17
Milwaukee & St. Paul Ry. v. Kellogg, 94 U. S. 469 ... 21
Plumley v. United States, 226 U. S. 545-547 ... 17
Ripley v. United States, 223 U. S. 695 ... 19
Rochester Tel. Corp. v. United States, 307 U. S. 125 ... 13
Shields et al. v. Utah Idaho Central R. R. Co., 305 U. S. 177 ... 19
Sweeney v. United States, 109 U. S. 618 ... 20
Terral v. Burke Construction Co., 257 U. S. 529 ... 14
United States v. Blair, 321 U. S. 730 ... 9, 11
United States v. Callahan Walker, 317 U. S. 56, 58 ... 12
United States v. Esnault-Pelterie, 303 U. S. 26 ... 13
United States v Gleason, 175 U. S. 588 ... 11
United States v. Mason & Hagner, 260 U. S. 323 ... 21
United States v. McShain, 308 U. S. 512 ... 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 431.

THE UNITED STATES, *Petitioner*,

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, and PAUL H. BEUTTAS, Trading as B-W CONSTRUCTION CO., NOT INC., *Respondents*.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

Short Statement of the Case.

Respondents brought suit in the Court of Claims of the United States, to recover excess costs incurred by them as the result of delays caused by the pet[illegible]r incident to the construction of the foundations of the Jane Addams Houses in Chicago, Illinois, and increased labor costs.

Judgment in favor of Respondents in the amount of $13,388.27, consisting of $8,727.44 as stipulated and $4,660.83 as excess labor costs, was entered by the Court of Claims June 5th, 1944 (R. 45), and the petition of the Government for a writ of certiorari was granted by this Court November 20th, 1944 (R. 46).

Statement of Facts.

While we agree, with certain exceptions, with the statement of facts contained in the Petitioner's brief (Br. pp. 3-7), the essential facts will be here briefly stated for convenient reference.

The respondents entered into a contract with the petitioner November 26, 1935 for the construction of the foundations of the Jane Addams Houses in Chicago, Illinois, for the consideration of $104,890.00, the contract providing that the work was to be completed within seventy-five calendar days after receipt of notice. (Fdg. 2; R. 22)

On November 21, 1935 the District Manager of the Housing Division of Public Works Administration at Chicago wrote the respondents in part as follows:

> "With this information at hand please arrange to proceed with the work under your contract for foundations for Jane Addams Houses, Project H-1405, as outlined in the plans and specifications.",

and the respondents, in accordance therewith, did proceed with the work in accordance with this direction of November 21. (Fdg. 8; R. 24)

On December 10, 1935 the contracting officer, due to changes that were being made by him, ordered the respondents to suspend all work until further notice, and the work was suspended and held up by the contracting officer until February 17, 1936 but, due to weather conditions at that time, respondents were unable to proceed until February 26, 1936. (Fdg. 9; R. 25)

The specifications provided the hourly wage rates which were to be paid and stated,

> "The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract."

and Article 19 of the contract provided:

> "The wage rates established in the specifications shall be subject to change by the Federal Emergency Administrator of public works. In the event that the Federal Emergency Administrator of Public Works establishes different wage rates the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract." (Fdg. 5; R. 24)

On December 28, 1935 respondents received a report from their superintendent on the project based on information obtained by him that the Federal Emergency Administrator of Public Works was about to change the scale of wages for carpenters and laborers on PWA projects. At that time the government had not issued invitations for bids and specifications for the project covering the superstructures of the Jane Addams Houses, the foundations of which were covered by the respondents' contract. The government specifications and invitations for bids for such superstructures were issued February 15, 1936, which set forth a scale of wages applicable to the superstructures in excess of those set forth for the foundations covered by the respondents' contract. (Fdg. 12; R. 27)

At the commencement of their work respondents began paying the rate of wages set forth in their contract and continued to pay such wages until sometime in February or March, 1936. Respondents' force was unionized and, because they were not paying the wage scale provided in the invitation and specifications for the superstructures, the union called a strike and thereby enforced payment by re-

spondents of the wage scale provided in the project for th superstructures and demanded payment on the increase scale retroactive to January 8, 1936, which was paid by th respondents. (Fdg. 12; R. 28)

The scale of wages announced in the invitation for bid and specifications for the superstructures was higher tha the scale prevailing in the territory at that time on privat jobs, and the difference paid by the respondents betwee the two scales amounted to $4,321.00. (Fdg. 13; R. 28)

A dispute arose between the petitioner and respondent as to reimbursement for the additional wages paid over an above those set forth in the invitation for bids and the con tract, the respondents contending that the petitioner ha established higher wages on the project and that they wer entitled to be reimbursed such increase as an added cost The final change order No. 1 covering the foundations wa revised and reissued by the Assistant Administrator o June 25, 1936 after the respondents' work had been sub stantially completed and did not include the wage increas in dispute, but reserved to the respondents their right t prosecute their claim. (Fdg. 14; R. 28)

The respondents appealed to the Assistant Administra tor of Public Works, who rendered a decision on June 29 1936 and with reference to the claim for increased wages decided that the respondents were entitled to $909.00 bu that the payment thereof was dependent upon the opinio of the General Accounting Office and should be submitte to it. (Fdg. 16; R. 30)

On February 12, 1937 the respondents appealed to th Federal Emergency Administrator of Public Works, th head of the Department, and petitioned him for a decisio of their claim. (Fdg. 17; R. 30)

On May 20, 1937 the Hon. Harold L. Ickes, Federa Emergency Administrator of Public Works, after consid ering the respondents' appeal, addressed a letter to th Comptroller General, in which he denied the respondents

claim for increased wages, except in the sum of $909.00. In his report to the General Accounting Office he stated in part as follows:

> "I *understand* that the minimum rates specified are in accordance with those set forth in an agreement entered into between the Building Trade Employers' Association and the Unions of the City of Chicago. I do not have at my disposal a copy of this agreement, which I *understand* established the rate contractors were to pay as wages up to and including January 1, 1936. I *understand* that the contractor is a member of this Association and had in his possession a copy of the agreement with the Unions prior to the time of his bidding. The Government had no way of knowing what minimum rates would be established after January 1, 1936, as the Unions and the Building Trade Employers' Association had not established the rates for the year 1936 at the time the foundation work was bid upon. . . . Furthermore, I *am of the opinion* that the Contractors in the City of Chicago were advised by the Union that on January 1, 1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936." (Italics Supplied) (Fdg. 18; R. 31)

The statement made in the above quoted letter that the labor rates of wages provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated January 1, 1936, and that thereafter higher rates were to be established, was an error. The agreement between the Building Trade Employers' Association and the Unions fixing rates of wages did not expire until May 31, 1936. (Fdg. 19)

Three of the four judges hearing the case decided that all of the proof showed that the laborers would not have struck except for the government's action in establishing a higher minimum wage on the *very same building* on which the respondents' laborers were employed, and that the petitioner must have known that this would be the necessary consequence of its act, and further held that under Article

15 the parties did not agree in advance of any dispute to waive their right to sue for breach of the contract and to leave the final determination of any controversy to the decision to one of the contracting parties.

The judgment in favor of Respondents included $4,660.83 for increase of wages (R. 40) and of that amount $3,751.83 is the only part of the judgment which the Petitioner seeks to have reversed (B. p. 7).

Summary of Argument.

1. Article 15 was not intended to apply to the question of whether the Government's acts had caused the contractor to pay higher wages.

2. That if article 15 was so intended, then it could not validly be agreed to by the parties.

3. That the Government did establish different wage rates and is liable to the Respondents for the increase.

Argument.

1.

Article 15 not intended to apply to the question of whether the Government's acts had caused the contractor to pay higher wages.

Article 15 of the contract provides in part as follows:

> "Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned, or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed." (R. 23)

Harold L. Ickes, Federal Emergency Administrator of Public Works, in his letter to the Comptroller General made certain findings of fact and then stated his *opinion* as follows:

> "I am of the opinion that this claim should be disallowed in its entirety, as I find that the acts of the Government, in advertising for the superstructure contract and in the establishing rates for that contract on February 15, 1936, did not increase the wage rates that the Contractor was obligated to pay, and that wages were increased because of the expiration on January 1, 1936, of the agreement with the Unions, and the signing of a new agreement. Furthermore, I am of the opinion that the Contractors in the City of Chicago were advised by the Unions that on January 1, 1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936." (R. 32-33)

Because of the foregoing the Government argues that the Court is without power to grant the respondents relief, upon the theory that the letter of Mr. Ickes to the Comptroller General was a decision by the head of the department as contemplated by article 15.

In the outset it is interesting to note that the Government in its brief before the Court of Claims took the very definite position that the recommendation of Mr. Ickes was not binding on either party to the contract and we quote from that brief:

> "Furthermore, Secretary Ickes' views with respect to plaintiffs' claim were immaterial, since he was not deciding an appeal from the ruling of the contracting officer pursuant to Article 15 of the contract, but was merely making an administrative recommendation to the Comptroller General which was not binding upon either plaintiffs or defendant, and which had no effect whatever upon plaintiffs' right of recovery."

We are entirely in agreement with the foregoing that Secretary Ickes was merely making an administrative rec-

ommendation to the Comptroller General which was no binding upon either of the parties to the contract. He was not making a decision as contemplated by article 15 and he did not so consider himself as doing so, as he concludes his letter as follows:

> "The balance of the enclosed voucher in the amount of $21,823.19 is referred to you for direct settlement *without my certification*, but it is my recommendation that, in addition to the amount I have certified as being due under the contract, the Contractor be reimbursed for the individual items recommended in settlement of this claim." (R. 34) (Italics supplied)

If this letter of the head of the department to the Comptroller General was a decision as contemplated by article 15, why was it not "final and conclusive upon the (Government) parties"? If Secretary Ickes thought he was making a decision under article 15, why did he submit it "without my certification," and why was this decision, which the Government now says was "final and conclusive upon the parties", not carried out by the Comptroller General? The Comptroller General did not consider it final and conclusive upon the parties, as he refused to authorize payment of any of the controverted items, (R. 34) notwithstanding the fact that Secretary Ickes had made recommendation that certain of them be paid. Was his letter a decision under article 15 and therefore final and conclusive as to the contractor but not such a decision when applied to the Government?

It is true that the Government now advances the proposition that the letter of Secretary Ickes allowing $909.00 for excess wages was conclusive under Article 15, and therefore the respondents are entitled to that amount (B. 7), but that was not its position in the Court of Claims where it stated in no unmistakable terms as follows:

> "As we have shown above, however, pages 91-93, the letter of the head of the department to the Comptroller General was not a ruling upon an appeal pursuant to

Article 15 of the contract; it was merely an interdepartmental recommendation which was not and did not purport to be an interpretation of the contract binding upon either plaintiffs or defendant. This is further obvious from the fact that the head of the department declined to certify as due to plaintiffs the amount of their damages which he found due to delay, for if he had considered that defendant was obligated to pay this amount as an equitable adjustment under Article 3 of the contract, he would have certified such damages as due under plaintiffs' final voucher."

The Government argues that under Article 15, there is lodged with the head of the department the sole right to make final and conclusive decisions on *all* questions whether they be questions of fact or of law, such as whether or not there has been a breach of a contract, but cites no cases by this Court or any other Court so holding.

Petitioner argues that both parties proceeded in the belief that Article 15 prescribed the applicable administrative procedure, the dispute being submitted to and passed upon by the contracting officer, Assistant Administrator and finally by the head of the department and that the meaning given to it by both parties would be dispositive, and then cites certain authorities to support this view. Of course the Respondents recognized that so far as procedure was concerned, they must follow the terms of the contract, as this Court has held on many occasions that " * * * the appeal provisions of the contract must be exhausted *before relief is sought in the courts.*" *United States* v. *Blair* 321 U. S. 730. (Italics supplied).

As stated by Judge Whitaker in his opinion:

"Here the agreement, as construed by the defendant, is to leave the settlement of the dispute not to arbitrators but to an agent of one of the parties. It is an agreement to leave to the party who made the contract the determination of whether or not it had breached it. "If Article 15 is to be given such a broad scope, then an aggrieved contractor is denied access to this court save only in those cases where the decision of the con-

tracting officer on whether or not he has breached his contract is arbitrary or capricious or so grossly erroneous as to imply bad faith. Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued." (R. 39)

Further on he states:

"We are of the opinion that they (Government) intended to demand only that the contracting officer should decide questions of fact arising as the work progressed, such as the proper interpretation of the requirements of the contract documents, the fitness of the materials, and the sufficiency and amount of the work etc. Article 15, providing for decisions by the contracting officer, concludes, 'In the meantime the contractor shall diligently proceed with the work as directed.' This clearly indicates they had in mind only those disputes that arose during the progress of the work. It negatives the idea that after the contractor had done all the work required of him, the contracting officer should decide whether or not he had been paid all he was entitled to." (R. 39-40)

On this question Judge Madden in his concurring opinion states as follows:

"Since the Contracting Officer cannot make a decision effective against the Government, that the Government has breached its contract, and since if he did so, we would not be bound by it, he frequently does not decide the question at all if his decision would be against the Government. This means that, in practice, the contractor, if he meant, by agreeing to Article 15, to lodge in the Contracting Officer the power to decide questions of breach of contract, has given that official power to decide cases against him, but no power to decide cases effectively in his favor. No contractor in his right mind would ever intend to do that. And no Government official, in drawing a contract, would intend to include in it such an unconscionable provision. . . . I therefore agree with the court that Article 15 was not intended to give to the Contracting Officer the power of decision which the Government claims for him, and that we are not foreclosed from deciding the case." (R. 41)

We submit first, that Secretary Ickes was not making a decision as contemplated by Article 15, and second, that a fair and natural interpretation of Article 15 is that it relates to questions of fact and does repose in the head of the department the absolute right to make decisions on questions of law, such as whether or not there has been a breach of contract, as to hold otherwise would leave solely to the party who may have breached the contract the right to decide whether or not it had breached it.

Analysis of authorities relied upon by petitioner.

Petitioner cites various decisions by this Court and claims that the present decision of the Court of Claims is in conflict therewith, and thus bases its reason for claiming that the Court of Claims should be reversed.

An examination of the decisions cited will disclose that the present decision of the Court of Claims is not in conflict therewith and, therefore, there is no grounds for reversal.

Kihlberg v. United States, 97 U. S. 398.

This suit involved a contract between the parties for the transportation of government stores and supplies, the contract providing that payment was to be made in all cases according to the distance from the place of departure to that of delivery, and that the Chief Quartermaster *was to fix the distances which should govern in the settlement of the contractor's accounts for transportation.* This Court decided that under the circumstances in that case there was no inference that the Chief Quartermaster did not exercise the authority given him with an honest purpose to carry out the real intention of the parties.

United States v. Gleason, 175 U. S. 588.

This case involved a contract which contained a provision that if the contractor should by freshets, ice or other force or violence of the elements and by no fault of his

own be prevented from commencing or completing the work or delivering the material at the time agreed upon in the contract, such additional time "may" in writing be allowed the contractor for such commencement or completion *as in the judgment of the contracting officer, or his successor shall be just and reasonable.* The Court below construed the foregoing word "shall" instead of "may". This Court disagreed with the lower Court and decided that so long as the engineer was not guilty of bad faith or of mistake or negligence so gross as to justify inference of bad faith, the judgment of the engineer was final.

United States v. *Callahan Walker*, 317 U. S. 56, 58.

This case involved a Government construction contract. A dispute arose concerning extra work, but the contractor did not appeal to the head of the department, as provided in article 15. The Court of Claims held that the contracting officer paid no attention to article 3, and that an appeal to the head of the department was not necessary. This Court disagreed and held that if the questions were erroneously determined by the contracting officer, the contractor's remedy was by way of appeal to the head of the department as provided by article 15.

United States v. *McShain*, 308 U. S. 512.

In this case a dispute arose between the contractor and the contracting officer with respect to the proper interpretation of the plans and specifications. The Court of Claims decided in favor of the contractor, and the question presented by the petition for writ of certiorari was as follows:

> "Whether the Court of Claims properly disregarded the decision of certain governmental officers upon the *interpretation of the plans and specifications*, when the Court made no finding of gross error sufficient to imply bad faith." (Italics supplied)

This Court granted certiorari and in a Per curiam decision reversed the Court of Claims

United States v. *Blair*, 321 U. S. 730.

This case arose out of a government contract.

The Contractor had not availed himself of the appeal provisions of the contract found in Article 15, and this Court held that said ***appeal provisions must be exhausted before relief is sought in the Courts*** as there was no finding or evidence that appeal to the head of an appropriate department would have been futile or prejudicial.

2.

That if Article 15 was so intended, then it could not be validly agreed to by the parties.

In the event this Court decides in favor of the respondents on the first question then there is no need of considering the second question presented.

Assuming for the time being that Article 15 was intended to apply, that is to give the head of the department the *absolute* right to decide *all* questions arising under the contract, whether factual or legal, and whether either party had breached the contract, then it is clear that such an agreement could not be validly entered into by the parties.

The petitioner argues that a claimant is free to resort to the courts, the only effect of such a stipulation being to narrow the field of judicial inquiry. If the petitioner's contention is correct, that the decision of the head of the department on *all* disputes concerning questions arising under the contract is final and conclusive, and binding upon the parties, then the field of judicial inquiry is not narrowed, *but entirely eliminated*.

In approaching this question we must first look to the statutory authority for hearing and determining claims founded upon contracts with the United States. By Act of Congress of February 24, 1855, Judicial Code Sec. 145, (28

U. S. C. 250) there was created the Court of Claims, which Act provided in part "—the said court shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States. * * *" That is the statutory authority for the hearing and determining of claims against the United States growing out of a contract. Congress having set up a court for the purpose of hearing and deciding such claims it is beyond the power of same officer of the Government to so draft a contract as to take away from that court the authority given it by Congressional Act.

If the petitioner's contention is correct then the right given by the Act of Congress to sue in the Court of Claims is taken away. A provision in a contract which gives to one of the parties the absolute right to determine all questions which may arise, and takes away from the other party any and all rights to question the correctness of the decision of the other party on all questions, is clearly void.

Insurance Co. v. *Morse*, 20 Wall. 445, 450, et seq.; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 537; *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, 142; *Martin* v. *B. & O. R. R.*, 151 U. S. 673 684; *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

Judge Whitaker in his opinion on this phase of the matter states in part as follows:

> "If Article 15 is to be given such a broad scope, then an aggrieved contractor is denied access to this court, save only in those cases where the decision of the contracting officer on whether or not he has breached his contract is arbitrary or capricious or so grossly erroneous as to imply bad faith. Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued. On February 24, 1855, Congress passed an Act creating the Court of Claims and said, '*the said court* shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States. * * *" (Italics supplied.) This provisions is the law today. Section 145 of the Judicial Code; sec.

250, Title 28 U. S. C. It was the law when this contract was entered into. Can it be said that if was in the power of any officer or agent of the Government to set aside this Act of Congress and to say that the contracting officer, and not the Court of Claims, "shall hear and determine all claims founded upon [this] contract"? Such a provision is contrary to the law established by Congress and, therefore, is void.

Not only is it beyond the power of a party to bargain away this right given by Congress, but it must be borne in mind that bidders on this work were forced to enter into this sort of an agreement. The Government contends that as to this project this governmental agency said, the right given by Congress to sue in the Court of Claims is hereby taken away; an aggrieved contractor can secure redress only by appealing to the contracting officer; he will decide whether or not we have paid you all we promised to pay." (R. 39)

Judge Madden in his concurring opinion on this question stated as follows:

"And if both of them did, with their eyes open, intend any such agreement, we would feel bound to conclude that the law permitting Government agents to make contracts, and the statutes giving to a victim of the Government's breach of contract the right to sue in this court, do not authorize an agent of the Government to defeat that right by making such an unconscionable bargain about it." (R. 41)

* * * * * * * * *

"But what the Government here urges, the power in the Contracting Officer to decide the ultimate question of whether his principal has breached its contract, should not be tolerated." (R. 42)

Petitioner argues that whether the Government committed a breach of the contract was an issue, which in a law action would be left to the jury, and then cities certain cases, in which the circumstances were such, as shown by the evidence, that it was proper for the question to be submitted to the jury. In the present case, according to the evidence

there is no dispute as to the facts, and upon those undisputed facts the Court of Claims has decided there was a breach of the contract. But aside from the foregoing, submitting to a jury the question of whether there has been a breach of contract, is entirely different then claiming you can legally repose in one party to a contract the absolute right to decide whether or not *he* has breached the contract.

It further states that considerable safeguards attach to the decisions of the head of a government department or agency, who is responsible to the Chief Executive, and to the Congress, and the assumption must be that he will ordinarily decide controversies fairly and with the regard to the just rights of the contractor. We are quite at a loss to understand to just what safeguards the Petitioner refers, when it contends, as it does in this case, that the decision of the head of the department on *all* questions is final and conclusive. But we agree there are safeguards, and those safeguards are the United States Courts to which Congress has given claimants the right to seek relief from unfair decisions made without regard to the rights of contractors.

We submit that if it was intended that Article 15 should have the broad meaning claimed by the Petitioner, then it was illegal and not binding on the Respondents, and that the Court of Claims had the right to hear and determine their claim.

Analysis of authorities relied upon by Petitioner.

Martinsburg & Potomac R. R. Co. v. *March*, 114 U. S. 549, 553-554.

This was a suit to recover a balance claimed to be due plaintiff on a contract for grading and masonry on a section of a railroad contract, which provided among other things that whenever the contract shall be completely performed on the part of the contractor and the defendant's engineer shall certify the same in writing, together with his

estimates, the company shall within thirty days after receipt of such certificate pay to the contractor the amount due. The declaration contained a copy of the contract but did not contain an allegation that the engineer had ever certified in writing the complete performance of the contract, together with an estimate of the work and the amount of compensation due the contractor according to the prices established by the parties. The defendant demurred to the declaration, which was overruled. This Court held that the demurer should have been sustained for the reason that the parties had agreed that the certificate of the company's engineer was necessary, and there was no allegation that the engineer had been guilty of fraud or such gross mistake as to imply bad faith, or had failed to exercise honest judgment in discharging his duties. The declaration did not state facts entitling the plaintiff to sue the company in the absence of such a certificate.

Plumley v. United States, 226 U. S. 545-547.

This was a suit by a contractor for extra work and damages for delay. The contract provided that if there was any discrepancy *between the plans and specifications or between the contract of McLaughlin* (previous contractor) *and the contractor*, Plumley, the matter should be referred to the Secretary, the plaintiff agreeing to abide by his decision in the premises. The Secretary decided against him and this Court held that under the circumstances his construction was binding on the contractor.

Merrill-Ruckgaber Co. v. United States, 241 U. S. 387.

This was a suit by a contractor for extra work, the contract providing that the decision of the Supervising Architect *as to the proper interpretations of the drawings and specifications* should be final. There was a disagreement between the parties and the contractor applied to the Secretary of the Treasury, who confirmed the action of the Architect. This Court, in deciding in favor of the govern-

ment, held that there was no intimation of unfairness on the part of the Supervising Architect and that there was no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect, and that the contract explicitly provided that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications would be final.

Goltra v. *Weeks*, 271 U. S. 536.

This was a suit by the plaintiff to enjoin seizure of a fleet of tow-boats and barges which had been held by him as lessee. He charged a conspiracy to unlawfully deprive him of the boats. The Secretary of War had notified the lessee that in his judgment the lessee had not complied with the terms and conditions of the contract in that he failed to operate the boats as a common carrier and in other particulars and declared the contract terminated. The contract provided that the government reserved the right to make certain inspections and that non-compliance in his judgment with any of the terms and conditions of the lease would justify the termination of the lease. The evidence showed that from the time the plaintiffs got the boats they were not in use but were tied up except for the transportation of two small cargoes, and the bill of complaint admitted that the plaintiff had not fulfilled his covenant to operate as a common carrier. The plaintiff was given notice on March 4 of the termination and answered on March 8, but he tendered no facts upon which either the Secretary or Chief of Engineers could have any different conclusion from that already reached from the failure of the plaintiff to fulfill his obligation. Under the circumstances this Court dissolved the injunction.

United States v. *Esnault-Pelterie*, 303 U. S. 26.

This was suit brought in the Court of Claims claiming infringement of a patent by the United States. There was a judgment for the respondent in the Court of Claims. This

Court in affirming the Court of Claims, points out that the United States can only be sued for infringment in the Court of Claims by Act. of Congress, and that review by this Court of judgments of the Court of Claims, was under such regulations as this Court shall adopt, and that such regulations provide that the duty is upon the Court of Claims to resolve conflicting inferences and to draw from the evidence the necessary conclusions of fact. We fail to see where this case has any application to the question under discussion.

The case of *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, was a case involving a ruling by the Federal Communications Commission, and that of *Shields et al* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, involved a determination by the Interstate Commerce Commission, both Commissions being created by Acts of Congress, wherein they were given authority to make certain rulings and determinations. The questions involved in each was whether or not the rulings and determinations made were beyond their authority and this Court rightfully held that the rulings and determinations made in conformity with the Act of Congress were binding on the parties. We fail to see the applicability of these cases as well as *Gray* v. *Powell, infra*, as there has been no Act of Congress giving to the head of the department the right to decide all questions involved in a Government contract, on the contrary, that right has been given by Act of Congress to the Court of Claims.

Ripley v. *United States*, 223 U. S. 695.

This was a suit by a contractor for damages sustained by carrying out a contract to build a jetty. The contract provided that certain blocks should be laid on the jetty as the work progressed and *when in the judgment of the United States Agent in Charge the case or mound has sufficiently consolidated*. The Agent refused to permit the contractor to lay the blocks at certain times, causing the

contractor additional costs. This Court held that no matter how long the delay or how great the damage he was not entitled to recover unless the refusal was the result of fraud or of such gross mistake as would imply bad faith. This is quite different from saying that the decision of the head of the department on *all* questions shall be final and conclusive.

Sweeney v. *United States*, 109 U. S. 618.

This was a suit to recover the costs of a wall built around the National Cemetery at Fort Harrison, Virginia. The contract contained a provision that a representative of the government would be designated to inspect the wall, and after such representative should certify that the wall was in all respects as contracted for it should be received and become the property of the United States.

The representative of the government reported that the wall had been constructed without paying any attention whatever to the instructions given relative to material, nor to the orders given with regard to the gate-posts. That the condemned material was used and that he considered the workmanship unsatisfactory. As a result of the foregoing report the wall was taken down and a new one constructed in its place. No representative of the government ever certified that the wall constructed was in all respects as contracted for by the claimant or in any respect as contracted for. This Court held that the claimant could not recover for the reason that the government representative expressly refused to give the necessary certificate on the grounds that neither the material nor workmanship was such as the contract required, and that there was no showing of any fraud, nor such gross mistake as would imply bad faith, nor any failure to exercise honest judgment, and that the claimant had been notified of the defective character of the material and that it would not be accepted before he put it into the wall.

Milwaukee & St. P. Ry. v. *Kellogg*, 94 U. S. 469.

This was a suit for compensation for destruction by fire of the plaintiff's sawmill. The question involved was whether or not the fire which originated upon the defendant's steamboat was proximate cause of the destruction of the plaintiff's sawmill. The defendant requested an instruction that the injury sustained by the plaintiff was too remote from the negligence of the defendant to afford a ground for recovery, which instruction was denied, and the question was left to the jury. This Court, in deciding in favor of the plaintiff, held that the true rule is that what is the proximate cause of an injury is ordinarily a question for the jury.

United States v. *Mason & Hagner*, 260 U. S. 323.

This case involved a "cost plus contract" and provided that the contractor should be reimbursed for all expenditures as should be approved by the contracting officer. The item in dispute was for premiums, the War Department having decided that it was a proper charge against the contract, while the Comptroller of the Treasury Department had disallowed the item. This Court held that as the War Department had approved the item, as it had a right to do under the contract, the Comptroller of the Treasury had no power over the decision of the War Department, which was exercised in accordance with the terms of the contract.

Gray v. *Powell*, 314 U. S. 402.

This was a suit by the Receiver of the Seaboard Air Line Ry. for an exemption of certain coal from Bituminous Coal Code on the ground that they were both producer and consumer of the coal. A hearing was had before the National Bituminous Coal Commission, which was later changed to the Bituminous Coal Division, and an order was entered denying exemption. Upon review there was a decree re-

versing the Director's order and this Court affirmed the decree below. The decision was upon a petition for rehearing and this Court reviewed the conditions of the contract under which the coal was obtained by Seaboard as well as the various legislative enactments which sought to bring about a solution of the economic difficulties of the soft coal industry. The question involved was whether the Director's findings that Seaboard was not a producer of coal was to be sustained. This Court, after reviewing the Bituminous Coal Act and the provisions therein which provided for the determination by the commission and the review thereof by the Court, stated as follows:

> "In a matter *left specifically by Congress to the determination of an administrative body*, as the question of exemption was here by §§ 4-II(1) and 4-A, the function of review placed upon the courts by § 6 (b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner." (Italics supplied)

Burchell v. *Marsh*, 17 How. 344.

This case involved a bill in equity to set aside an award of arbitration as fraudulent and void. The answer denied the arbitrators acted unjustly but on the contrary acted justly, fairly and with due consideration for the rights of the parties. The matter was submitted on bill and answer. The lower Court set the award aside. This Court reversed the lower Court, stating that they were of the opinion that the record furnished no evidence of corruption or misbehavior in the arbitrators nor of ignorance as charged in the bill, or of any mistake which would justify the Court of Chancery in annulling it.

Comb v. *United States*, 100 Court of Claims 240.

In this case, which involved a construction contract, the question involved was that of furnishing temporary heat.

The contract provided that if there was no existing system to connect to, the contractor should supply sufficient heat by connecting up the boiler to be installed in the building or by other means approved by the Superintendent of Construction. The Superintendent of Construction refused to permit certain connections to be made. The contractor protested to the Commissioner of Indian Affairs, who sustained the Superintendent. Whereupon, the contractor applied to the head of the Department, who reversed the decision of the Superintendent and directed that a voucher be prepared to cover the costs incurred by the contractor. The Comptroller refused to pay on the ground that the decision of the contracting officer was final and conclusive. The Court of Claims held that the Comptroller was wrong, as he gave no consideration to the contractor's right of appeal to the head of the Department.

We again submit that there is nothing in the foregoing decisions which is in any way contradictory to the decision of the Court of Claims or applicable to the present question, and granting a writ of certiorari is not justified.

3.

That the Government did establish different wage rates and is liable to the Respondents for the increase.

1.

There can hardly be any doubt that the only reason the Respondents were compelled to pay the higher rates was because the Federal Emergency Administration of Public Works increased the rates. The record is conclusive that the rates provided for in the specification of the foundations were the rates prevailing in Chicago at the time, and that these rates remained in force on work other than PWA projects until May 31, 1936. Had the Federal Emergency Administration of Public Works not announced the higher rates in the specifications for the superstructure on Feb-

ruary 15, 1936, no question would have been raised by the Respondents' workmen, and the job would have been completed at the prevailing rates, which were the rates inserted by the Petitioner in the specifications of the Respondents' contract.

Mr. Ickes, in his report dated May 20, 1937 to the Comptroller General of the United States, admits that the Respondents did pay increased wages as claimed herein, but attempts to excuse the Government from payment thereof by saying that while he does not have at his disposal a copy of the agreement between the Building Trade Employers' Association and the unions of the City of Chicago, he *understood* that the minimum rates specified (in the contract for the foundation) are in accordance with those set forth in said agreement, and that he *understood* it established the rate the contractors were to pay as wages up to and including January 1, 1936.

Aside from the fact that the foregoing statements by Mr. Ickes are mere assumption and could hardly be called findings of fact, they are not correct, for the reason that the only evidence in the case shows that the rates, as provided for in the specifications of the contract for the foundations, were in effect between the unions and the Building Trade Employers' Association up to and including May 31, 1936. (Pltfs. Ex. 23.)

Mr. Ickes further states in his report that the Government had no way of knowing what minimum rates would be established after January 1, 1936 and that the contractor should have been guided by the unions' agreement and to have provided in his bid against any possible increase in wages over and above the minimum specified. This is exactly what the Respondents did. They knew that there would be no change in the rates as provided for by the agreement between the unions and the Building Trade Employers' Association until May 31, 1936 and that the contract provided that in the event any increase was established by the Federal Emergency Administration of

Public Works the contract price would be adjusted accordingly. They did do exactly what Mr. Ickes said they should have done in order to protect themselves.

Mr. Ickes' sole reason for disallowing the claim is based upon his *opinion* that the rates provided for by the agreement between the Building Trade Employers' Association and the unions of the City of Chicago terminated January 1, 1936 and that thereafter higher rates were to be established. Here again Mr. Ickes, aside from speculating, is making a statement contrary to the facts. As stated above, the only evidence in the case, and the fact of the matter is, that the rates between the Building Trade Employers' Association and the Union did not change until May 31, 1936.

Petitioner states that the Building Trade Employer's Association of which Respondents were a member, had an agreement with the construction unions in Chicago for the same minimum wage rates as those specified in Respondents' contract. That this agreement was in effect when the contract was made and was not to expire until May 31, 1936, three months after the job was originally scheduled to be finished and 12 days after it was actually completed. That it was necessary that the Government call for bids and enter into a contract for the superstructures in advance, so that work upon them could commence without delay immediately after respondents completed the foundations, but that the increased wage rates specified therein were not to take effect until after Respondents' contract was completed. We do not see how that statement adds any strength to the Petitioner's position as it admits that agreement with the constructions unions in the City of Chicago was not to expire until three months after the job was originally scheduled to be finished. The delay in completing was not due to any acts of the Respondents but on the contrary to acts of the Petitioner. While the contract was dated November 26, 1935, the respondents, by letter dated November 21, 1935, were requested to proceed

with the work, and as the contract provided for its completion within 75 calendar days, in the normal course of events the contract would have been completed in the early part of February, 1936, prior to the time when the specifications were issued for the superstructures, in connection with which the higher rates of wages were established, but that due to changes made by the petitioner the respondents were ordered to stop work on December 10, 1935 and were not able to proceed until February 26, 1936, after the specifications for the superstructures had been issued. (February 15, 1936.)

Judge Whitaker in his opinion on this phase of the case states as follows:

> "The contract was entered into on November 26, 1935, but defendant held up the work until February 17, 1936, when it gave plaintiffs notice to start work; however, work was not begun until February 28, 1936, due to bad weather. *While the work was under suspension* the defendant on February 15, 1936, asked for bids on the construction of the building above the foundation. (Plaintiffs' contract was for the foundation only.) This advertisement for bids required bidders to pay a minimum wage to the before-mentioned laborers higher than was provided for in plaintiffs' contract. A successful bidder on this part of the building could not pay common laborers less than 95 cents an hour, instead of the 82½ cents on the foundation contract, and could not pay carpenters, cement finishers, and hoisting engineers less than $1.50 per hour, instead of the minimum of $1.31¼ on the foundation contract.
>
> "Whereas on November 26, 1935, the Government thought not less than $1.31¼ was a fair wage for carpenters, cement finishers, and hoisting engineers, and 82½ cents for common laborers, by February 15, 1936, conditions had changed to such an extent that it no longer considered these fair wages and demanded of the superstructure contractor the payment of higher wages.
>
> "Plaintiffs' work did not commence until after this change in the wage rate. So, when the offered to pay

their carpenters, cement finishers, and hoisting engineers $1.31¼, and common laborers 82½ cents, these men very naturally said, no, the Government has said that no less than $1.50 and 95 cents is fair; and when plaintiffs would pay no more, they struck. In order to induce them to work plaintiffs had to pay the $1.50 and 95 cents.

"All the proof goes to show the laborers would not have struck except for the Government's action in establishing a higher minimum wage on the very same building on which plaintiffs' laborers were employed.

"That they should have struck was well-nigh inevitable. They had no contract with plaintiffs to work at any fixed wage and, so, when their Government said that the least that ought to be paid for such labor was more than plaintiffs offered, of course they demanded the amount fixed by the Government as fair and refused to work for less.

"So, while the defendant did not expressly demand of these plaintiffs that they pay a higher minimum wage on their contract, it nevertheless brought about conditions that made this almost inevitable, and it must have known that this would be the necessary consequence of its act. Just as effectively as though it had directly ordered plaintiffs to pay a higher wage, it indirectly required them to do so." (R. 35-36) (Italics supplied.)

"We are of opinion that the defendant in fact established different wage rates on plaintiffs' job, and, therefore, it is obligated to pay the increase under article 19.

"But whether or not this is so, it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. *Restatement of the Law of Contracts*, sec. 315 (1); *Williston on Contracts*, sec. 1293 A; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551. It was an implied condition of this contract that the Government would not do any act that as a necessary consequence would make performance by the plaintiffs more expensive. The Gov-

ernment breached that implied condition by increasing the minimum wage to be paid on a part of this building, which as a necessary consequence required plaintiffs to pay more wages than those specified.

"It follows that the defendant is liable for the increased wages plaintiffs had to pay." (R. 36-37)

We submit that the Federal Emergency Administrator of Public Works did establish different wage rates, which resulted in the Respondents being required to pay the increases in wages for which the Petitioner was liable.

2.

Secretary Ickes admits that the increased wages incurred by the plaintiffs due to the act of the government prohibiting the Respondents from starting the work is a fair and just charge against the government. (R. 33) The only dispute under his theory of the claim is the basis for arriving at the amount due from the Petitioners to the Respondents.

Mr. Ickes proceeds on the theory that the Respondents should be reimbursed for the increased wages paid by them during the 26 days following the proceed order of February 17, 1936. He arrives at this 26 days by using the stop order date of December 12 up to and including January 8, which is the date the higher wages went into effect. He then takes the total hours in the first 26 days following February 17, based on the plaintiffs' pay rolls, and finally arrives at a gross figure of $909.

As against the foregoing method adopted by Mr. Ickes we have the very direct testimony of the Respondents, first, that had they been permitted to proceed with the contract on November 21 they would have been able to complete it within the time specified in the contract, namely, 75 days. This would bring the date of completion of the contract to approximately February 3, 1936, and as the specifications for the superstructure were not issued until February 15, 1936 the contract would have been entirely completed be-

fore those increasd rates were publishd, and the Respondents should, therefore, be reimbursed to the full extent of the increased wages which they were compelled to pay, amounting to $4,660.83.

Assuming for the time being that the correct date to begin with is December 12 (the date when the Respondents received the stop order), here again we have the situation where they had 75 days within which to complete the work from December 9, 1935, and there is no reason to believe, and nothing in the testimony to the contrary, that the Respondents could not have completed the contract within 75 days. This would bring us to a date of February 24, 1936, when the contract would have been completed, and as the demand for increased wages was not made until sometime in February or March it is reasonable to assume that the contract would have been completed before the Respondents' employees struck for higher wages and there would have been no occasion to have gone back and paid them any increased wages whatsoever. Here again the showing is clear that the Respondents should be reimbursed to the full extent of the increased wages amounting to $4,660.83.

Again assuming for the sake of argument that the correct period to be taken into consideration is December 10 to January 8, we have the very positive testimony of the Respondents that had they been permitted to perform the contract during that period they could have completed from 35 to 40 per cent of their work, upon which basis they would be entitled to recover at least one-third of the increased wages, or the sum of $1,856.08, as against Mr. Ickes' figure of $909.

The Petitioner will probably argue that the testimony of the Respondents that they could have completed the contract within 75 days from November 21, 1935, is without any basis, but the fact of the matter is that they entered into a formal contract with the Petitioner, wherein they agreed to perform the work within 75 days, and there is

nothing in the case to indicate that they could not have done so. The fact that the government inserted in the contract the requirement that it was to be completed within 75 days shows conclusively that the Petitioner also expected the work to be done within that time.

With reference to the Respondents estimate that they could have performed from 35 to 40 per cent of the work between December 10 and January 8, it must be borne in mind that they were obligated to perform the entire contract within 75 days, and who would be better qualified than they to estimate the amount of work they would have completed within that period. In addition, between December 10 and January 8 there were 29 days, or over 38 per cent of the entire time within which the contract was to be performed, and it is not only a fair presumption but a logical one that they certainly would have completed not less than one-third of the work within the first 29 days.

In view of the foregoing it is submitted that upon this theory of the case the Respondents are entitled to recover the full amount they expended in increased wages of $4,660.83, and certainly in no event less than $1,856.08.

Analysis of authorities relied upon by Petitioner.

Petitioner cites two decisions of the Court of Claims in support of its contention, the first being *Le Veque, et al v. United States*, 96 Court of Claims 250, in which case the Court of Claims held that the establishment by the government of higher wages on another project in another part of the city did not require it to pay the increased wages upon the plaintiff's contract, and concluded that the increase in wages paid by the plaintiff in that case was not a necessary result of the government's act. The Court of Claims, in its decision in the present case, considered its decision in the Le Veque case, but pointed out that the facts in the present case were entirely different; that the increased wages in the present case were on the very same building on which the respondents were working, and con-

cluded that in the present case the government did in fact establish higher wage rates on respondents' job.

The other case cited by the petitioner is *Drava Corp.* v. *United States*, 93 Court of Claims 734. It is submitted that this case is not in point for the reason that the suit was brought under the Act of June 25, 1938, conferring jurisdiction upon the Court of Claims to hear and determine and enter judgment against the United States on behalf of contractors who had contracts with the United States and whose costs were increased as a result of the National Industrial Recovery Act. All the Court of Claims decided was that the plaintiff's increased costs were not the result of the National Industrial Recovery Act.

The case of *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, has no application to the present case, as it involved the question of the right of an electric power company operating in the State of Alabama to enjoin the execution of certain loan-and-grant agreements made by the Federal Emergency Administrator of Public Works with four municipal corporations.

Conclusion.

It is respectfully submitted that the Court of Claims correctly decided that the petitioner established different wage rates and was therefore obligated to pay the increase and that the judgment of the Court of Claims should be affirmed.

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 431.—October Term, 1944.

The United States, Petitioner,
vs.
Joseph H. Beuttas, et al., Trading as B-W Construction Co.

On Writ of Certiorari to the Court of Claims.

[April 23, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondents executed a contract with the petitioner whereby they agreed to construct the foundations for a public housing project. By Article 19 they agreed that workmen of designated classes should be paid specified minimum wages, and if, during the progress of the work, the petitioner should find it desirable that wages higher than those specified should be paid, it might establish different rates, and in such case the contract price should be adjusted accordingly.

The respondents paid wages higher than those named in the contract, and brought this action, *inter alia*, to recover the difference. They introduced evidence to prove that commencement of the work was suspended by delays on the part of petitioner's officers and by other conditions for which the respondents were not responsible; that during the period of suspension the petitioner asked bids for erection of the superstructure, and by its advertisement required bidders to pay higher rates to the same classes of workmen than the minima specified in the respondents' contract; that when respondents' employees learned of this, they demanded wages equal to those that were to be paid for work on the superstructure; and that to obtain workers and to settle a strike the respondents had to pay such increased wages.

It appears that respondents submitted a claim for reimbursement for the increase in wages to the contracting officer who disallowed it; and then appealed to the Assistant Administrator of Public Works who filed a written decision sustaining the contracting officer's ruling. The Administrator, in turn, rejected the claim. It is urged that the last-named official was in error as to certain

of the facts, but there is no suggestion that he acted arbitrarily or in bad faith.

The petitioner's defense is grounded in certain provisions of the contract and the specifications forming a part of it, and facts found by the court below.

Article 3 provided that the contracting officer might make changes in the drawings and specifications within the general scope thereof; that an equitable adjustment as to any increase or decrease of cost due to such changes by the contracting officer or, in specified cases, his superior, should be made; and that if the contractor was dissatisfied with the decision, the dispute should "be determined as provided in article 15 hereof."

Article 15 is:

"Disputes: All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, *all other disputes* concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed." (Italics supplied)

Paragraph 4 of Section 12 of Division I of the Specifications stated:

"The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

When respondents entered into the contract their employees were unionized and were working under a wage scale fixed by agreement which was in accord with the rates fixed by the contract. This agreement did not expire by its terms until twelve days after respondents completed their work. These workmen struck because they demanded the same wages as were to be paid to workmen under the superstructure contract, according to the advertisement for bids for that work. The petitioner did not participate in the negotiations between respondents and their striking workmen.

The Government's defenses were (1) that the dispute must be decided by the procedure prescribed in Article 15; that it had been

so decided on the respondents' invocation of that procedure; that no showing of fraud or arbitrary action had been made, and that accordingly the administrative decision was final and the Court of Claims without jurisdiction; and (2) that, in any event, no breach of the contract on the part of the Government had been shown. These contentions were overruled by a divided court, and judgment was entered for the respondents.[1]

1. The respondents' contention is that if Article 15 be construed to cover such a dispute it is void as an attempt to oust the jurisdiction of the Court of Claims to decide a pure matter of law, namely, whether on the facts found, the petitioner had broken the contract. A majority of the judges so held, and also thought Article 15 was not intended to cover such a dispute but only one as to changes, interpretation of the specifications and similar matters usually remitted to the judgment of an architect.

The parties devoted much of their argument here to the question whether only questions of fact, or questions of mixed law and fact can by contract be made subject to final determination by an administrative officer of the Government or whether a question of law may also, by contract, be made subject to final determination by such an officer. Our cases have not explicitly drawn any distinction between the two categories.[2] We find it unnecessary to decide the question, for we think it clear that the respondents may not recover for the increased wages in the circumstances of this case.

2. Two of the three judges in the majority below were of the view that the Government had in fact established higher wages for the respondents' work and was accordingly liable to pay the increased cost under Article 10 of the contract. All three judges in the majority held that, in any case, the Government is liable because what it did amounted to a breach of its implied obligation not to render performance more costly to the respondents.

Clearly the petitioner did not expressly avail itself of the option to set higher wage rates for the work covered by the respondents' contract. In the light of the quoted portions of the contract and

[1] — C. Cls. —; — F. Supp. —.

[2] See Kihlberg v. United States, 97 U. S. 398; Sweeney v. United States, 109 U. S. 618; United States v. Gleason, 175 U. S. 588; Plumley v. United States, 226 U. S. 545; Merrill-Ruckgaber Co. v. United States, 241 U. S. 387; United States v. Mason & Hanger Co., 260 U. S. 323; Goltra v. Weeks, 271 U. S. 536; United States v. McShain, 308 U. S. 512; United States v. Callahan Walker Co., 317 U. S. 56; United States v. Blair, 321 U. S. 730.

specifications it cannot be maintained that a recovery is justified pursuant to the covenants of the contract.

As an alternative ground of decision, some of the judges below resorted to the principle that it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. They held that by inviting bids for the superstructure at minimum wages higher than those fixed in the respondents' contract for the foundations the petitioner breached this implied condition. But, of course, this can be true only if the Government caused the increase in wages. And the findings, in our judgment, render a conclusion to that effect impossible. The Government did not stipulate that the two groups, those employed on the foundations and those employed on the superstructure, should work at the same time at different wages. On the contrary it had every reason to suppose that the former would finish their work at the then agreed rate before the latter came on the work. And this is what happened. There is no finding that petitioner's officers or agents had reason to expect that the fixing of a wage rate under another contract for a separate portion of the work, which was to be commenced after completion of respondents' contract, would cause a breach of their existing wage agreement by respondents' employees. Moreover, it is found that the petitioner took no part in the wage controversy between the respondents and their employees. It follows that there is no basis for a holding that the Government knowingly hindered respondents in the performance of the contract or culpably increased their costs.

There are other items going to make up the amount of the judgment entered by the Court of Claims which are not attacked [redacted] The cause will be remanded for further proceedings in conformity to this opinion.

MR. JUSTICE DOUGLAS concurs in the result.

As to the item of $3,751.83 increased wage costs, the judgment must be reversed; in other respects it is affirmed.